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Decision 01-11-031 November 8, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking into the operation of Interruptible load programs offered by Pacific Gas & Electric Company, San Diego Gas & Electric Company, and Southern California Edison Company and the effect of these programs on energy prices, other demand responsiveness programs, and the reliability of the electric system.	Rulemaking 00-10-002 (Filed October 5, 2000)

ORDER MODIFYING DECISION 01-04-006, AND DENYING REHEARING AS MODIFIED

San Diego Gas & Electric Co. (SDG&E) and Southern California Edison Co. (SCE) have filed for rehearing of Interim Decision (D.) 01-04-006 (the Decision). The Decision concluded Phase I of this ongoing rulemaking proceeding regarding interruptible electric service for the 2001 summer season and beyond. After receiving comments and reply comments on recommendations submitted by the Energy Division and a joint proposal submitted by certain parties, and later comments, reply comments and oral argument on the proposed decision, the Commission adopted changes in the interruptible tariffs and rotating outage programs of SDG&E, SCE, and Pacific Gas & Electric Co. (PG&E).

In addition to adopting several modifications to existing electric utility interruptible programs, the Decision established several new interruptible programs, including (1) the New Base Interruptible Program; (2) the Voluntary Demand Response Program; (3) the Air Conditioner Cycling Programs; and (4) the Optional Binding Mandatory Curtailment Program. It also made revisions in curtailment provisions and authorized SCE's customers to opt-out of the interruptible program retroactive to

November 1, 2000. Finally, the Decision adopted the expedited complaint procedure to resolve disputes between customers and utilities regarding requests for essential use status.

With regard to funding the costs of these new programs, no increase in current rates was provided by the Decision. Instead, in order to implement the new programs, SDG&E, PG&E and SCE were each authorized to establish a memorandum account to track program revenues and costs. A $25 million spending cap was placed on all of SDG&E's interruptible programs. SCE's cap for all such programs was set at $275 million. These annual dollar caps included amounts already authorized in current rates for each utility. (D.01-04-006, Ordering Paragraphs 16 and 17.)

SDG&E and SCE have filed applications for rehearing. SDG&E's application relates only to the lack of funding for the estimated increased costs resulting from imposition of the new programs. It asserts that the absence of funding in current rates sufficient to cover the estimated costs of the new programs constitutes legal error, as follows:

1. By denying funding for the new programs in current rates the Decision denies SDG&E the opportunity to earn a fair return on its investment at the time the investment is used for public service, and therefore the Decision confiscates or takes SDG&E's property without compensation.
2. The Decision violates P.U. Code Section 399.2[1] by denying SDG&E's ability to recover its just and reasonable costs.
3. The Decision violates Section 399.15 by ordering implementation of new conservation and load reduction programs without providing the necessary funding.
4. The Decision violates Section 451 by establishing unjust and unreasonable rates.
5. The Decision errs as a matter of fact and law by holding that SDG&E's performance based rate (PBR) mechanism forecloses the Commission from authorizing a surcharge

[1] Unless stated otherwise, all statutory references are to the Public Utilities Code.

> now and therefore constitutes an abuse of discretion.
> (SDG&E App. for Rehearing, p. 3.)

SCE also challenges the absence of any immediate source of funding. It estimates that only $186 million of the capped annual expenditures of $275 million are currently reflected in SCE's rates. It complains that without funding the estimated increased costs of about $90 million in current rates, there is no incentive to implement the new programs. Furthermore, it expresses fear that it will be barred from recovering reasonable costs recorded in a memorandum account as a result of our possibly ending the rate freeze before the recorded costs have been recovered. Given the lag in reasonableness reviews, the company maintains that the Decision delays or denies recovery of reasonably incurred program costs. This situation violates Section 451, SCE argues, because the Decision fails to provide a just and reasonable rate for services it mandates; and also violates the utilities' constitutional right to recover their prudently-incurred costs, citing Federal Power Comm. v. Hope Nat. Gas Co. (1944) 320 U.S. 591 and So. Calif. Gas Co. v. P.U.C. (1979) 23 Cal.3d 470, 476.

SCE's application contains two additional allegations of legal error. First, it contends that by allowing retroactive opt-out for SCE's interruptible customers the Commission has violated Section 728 which requires rates to be in effect prospectively; Section 368(2) (the rate freeze) by altering a rate in effect on June 10, 1996; Section 743.1(b), which SCE alleges establishes a freeze on the interruptible customer pricing incentive; and Section 453 because an undue preference is created for those customers who did not comply with directions to curtail. Finally, SCE contends that the Decision modifies three prior decisions in this proceeding (D.00-10-066; D.01-03-045; and D.01-03-070) without providing any notice or opportunity to be heard in violation of Section 1708.

Second, SCE contends that adoption of the Expedited Complaint Procedure (Section 1702.1 and Rule of Procedure 13.2)[2] to essential use customer classification

[2] Under Section 1702.1 this procedure is limited to a claim of less than $5,000 (see Code of Civil Procedure Section 116.2).

proceedings would deny SCE's right to due process. The company argues that since Rule 13.2 procedures are applicable to small claims involving small sums of money, it is entitled to normal complaint procedures with the right of legal representation and a transcript of evidentiary hearings because it could be subjected to monetary penalties and because essential use classification complaints will primarily raise legal issues. Last, it asserts that this aspect of the Decision was adopted without any finding of fact and without affording an opportunity to comment on it prior to adoption.

No responses were filed to the two applications.

DISCUSSION

We have considered both utilities' arguments and contentions in their applications. We conclude that each application lacks merit and rehearing should be denied as discussed below.

I. SDG&E'S APPLICATION

A. The Decision Does Not Result In Confiscation

SDG&E asserts that forcing it to carry a large balance in a memorandum account denies it revenue that it is rightfully entitled to now; and this results in confiscatory rates and an unconstitutional taking of its property. We do not agree.

The Fifth Amendment to the U.S. Constitution provides that "private property [shall not] be taken for public use without just compensation." The takings clause "limits the power of the states to regulate, control, or fix prices that producers charge consumers for good or services." (20th Century Ins. Co. v. Garamendi (1994) 8 Cal.4th 216, 292.) In the leading cases of Federal Power Commission (FPC) v. Hope Natural Gas Co. (1944) 320 U.S. 591, 603 and Duquesne Light Co. v. Barasch (1989) 488 U.S. 299, 307, the U.S. Supreme Court held that an unlawful taking or confiscation does not occur unless a regulation or rate is unjust and unreasonable, and whether a regulation or a rate is just and reasonable depends on a balancing of the interests of the regulated entity providing the services and the interests of the consumers of such services.

SDG&E's argument comes down to claiming it must receive immediate rate relief, rather than recording its costs for the new interruptible programs in a memorandum account for recovery later, even though it has not shown that it is currently operating at a loss. Nor has it submitted any evidence indicating that it cannot pay employee wages or salaries, or its debts, or that it faces immediate financial collapse and bankruptcy. Recovery of its new program costs has virtually been assured by the Decision, subject to the one limitation of reasonableness review. The Decision specifies the proceeding in which recovery of reasonable costs will be provided; namely its annual PBR proceeding. Investment expectations are provided for by the allowance for interest on the balance in the memorandum account. Under these circumstances SDG&E has the opportunity to earn a fair return, as established in FPC v. Hope Natural Gas Co. (1944) 320 U.S. 591, 602: "It is not the theory, but the impact of the rate order that counts. If the total effect of the rate order cannot be said to be unreasonable, judicial inquiry is at an end." In Hope, the U.S. Supreme Court expressly held that "[r]ates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed certainly cannot be condemned as invalid, even though they might produce only a meager return . . ." (Id. at 605.) Deferring actual recovery of possible additional costs by providing for a memorandum account in which to record these costs does not constitute a taking of property.

B. The Decision Does Not Violate Sections 399.2, 399.15, and 451.

1. Section 399.2

SDG&E asserts that the Decision fails to increase distribution revenue in violation of Section 399.2, which was enacted in 2000. The section states that each electric utility shall continue to operate its electric distribution grid in its service territory and shall do so in a safe, reliable, efficient, and cost-effective manner. It further provides that each utility shall continue to have a reasonable opportunity to fully recover from all customers of the electrical corporation all of the following.

1. reasonable investments in its electric distribution grid;

2. a reasonable return on the investments in its electric distribution grid;
3. reasonable costs to operate its electric distribution grid.

The company maintains that tracking any possible increased costs arising from the new programs in a memorandum account fails to constitute "a reasonable opportunity to recover those costs" since there is no certainty that the costs will ever be recovered.

In analyzing this contention, we look to the well recognized principles of statutory construction. The California Supreme Court has stated: "To interpret statutory language, the courts must ascertain the intent of the legislature so as to effectuate the purpose of the law." (California Teachers Assn. v. Governing Bd. of Rialto United School Dist. (1997) 14 Cal.4th 627, 632.) In determining the Legislature's intent, they are to "scrutinize the actual words of the statute giving them a plain and commonsense meaning." (People v. Vallodoli (1996) 13 Cal.4th 590, 597.) "In construing a statute, a court may consider the consequences that would follow from a particular construction and will not readily imply an unreasonable legislative purpose. Therefore, a practical construction is preferred." (California Correctional Peace Officers Assn. v. State Personnel Bd. (1995) 10 Cal.4th 1133, 1147.) "In analyzing statutory language, we seek to give meaning to every word and phrase in the statute to accomplish a result consistent with the legislative purpose. . . ." (Harris v. Capital Growth Investors XIV (1991) 52 Cal.3d 1142, 1159.)

Applying these principles shows that SDG&E's assertion lacks merit. It overlooks the fact that the Section 399.2(e)(3) clearly provides that nothing in it "shall be construed to alter or affect the ratemaking authority of the Commission." The Decision constitutes a lawful exercise of ratemaking authority in that it is not known if current rates allocated for interruptible programs will in fact be inadequate to cover the new programs' costs; and so the Decision provides that possible increased costs are to be recorded for later recovery with interest. The memorandum account complies with the section since it serves to provide SDG&E with the opportunity to recover its investment, operating costs, and a reasonable return.

2. Section 399.15 (former Section 379.5)

This section requires the Commission to expedite the adoption of several specific energy conservation demand-side management measures and other initiatives to reduce demand for electricity and reduce peak loads. The section begins by stating that:

> "Notwithstanding any other provision of law, within 180 days of the effective date of this Section, the commission, in consultation with the Independent System Operator, shall take all of the following actions, and shall include the reasonable costs involved in taking those actions in the distribution revenue requirements of utilities regulated by the commission, as appropriate."

Although the section does not specifically include the interruptible load programs involved in this proceeding, SDG&E contends that the plain meaning of this language requires the Commission to provide necessary funding concurrently and to allow recovery of the interruptible programs' recoverable costs without any tracking measure. Further, it emphasizes that the phrase "Notwithstanding any other provision of law" overrides any inconsistent or contrary statute.

However, this argument ignores the plain language at the end of the provision quoted above that simply states that the "reasonable costs" of the designated programs shall be included in the utilities "revenue requirement regulated by the commission, as appropriate." The memorandum account tracking system established by the Decision fully complies with this statutory direction as the appropriate and reasonable means for cost recovery, since the current rates include an allowance for some interruptible programs and the amount of increased costs for the new programs is unknown. Moreover, there is no requirement in the statute that the costs of any of the designated programs must be recovered immediately. Furthermore, the Decision set out the reasons supporting selection of the memorandum account procedure over other cost recovery methods, such as inclusion in the rates and charges of the Independent System Operator, or imposing another rate surcharge, or by charging the DWR procurement rate.

(See D.01-04-006, p. 74-78 (slip opinion).) Therefore, we conclude that there has been no violation of this section.[3]

3. Section 451

This section states that utility charges or rates "shall be just and reasonable." SDG&E contends that the Decision's tracking measure violates this section because it fails to allow the company to earn a fair return on its investment; and that the Decision is unreasonable because it forces the utility to finance an undercollection when it is in an overburdened financial situation.

SDG&E fails to provide any detailed financial information supporting this claim. In fact, it has indicated that the estimated rate relief it would require should be de minimis, only $0.001/KWhr. Providing that such a small amount be tracked in a memorandum account is not unjust or unreasonable. In addition, the Decision notes that some of the new programs do not require any new rates or funds, and the current rates include allowances for existing interruptible programs. Given the uncertainty of the level of increased costs that may be incurred as the result of new programs, we believe that the conclusion to utilize the memorandum account tracking procedure comes within the zone of reasonableness, insofar as Section 451 is concerned. And this conclusion is reinforced by the subsequent issuance of D.01-07-029, dated July 12, 2001, in which we reiterated that should the revenues collected under current rates be insufficient to fully recover the costs of the new interruptible programs, the unrecovered costs can be collected post-rate freeze.

C. The Decision Does Not Constitute An Abuse of Discretion

SDG&E attacks the Decision as being too vague with regard to assuring new program cost recovery; and as lacking a sound factual and legal basis in support of its denial of immediate rate relief; thereby resulting in an abuse of discretion in violation of Section 1757. It points to other small rate increases that have been granted recently to

[3] SDG&E's Application, page 12, cites Finding of Fact No. 4 and Conclusion of Law No. 2 as stating that the "Commission cannot raise electric rates to recover costs until the electric rate freeze has ended" or until there is specific legislative action imposing such an increase. In the Decision dated April 3, 2001 and mailed on April 4, 2001, neither this finding or conclusion of law refer to rate increases for recovery of interruptible program costs.

refute the position taken by the Decision that the Commission does not engage in a "piecemeal" approach to ratemaking.

Granting that some small rate increases have been authorized for SDG&E recently, it is our opinion that this position advanced by the utility does not rise to the level of constituting an abuse of discretion. The Decision provides a rational basis for instituting a tracking procedure for possible, but unknown, increased costs for new interruptible programs. We believe that our determination falls well within the zone of reasonable ratemaking and does not constitute an abuse of discretion.

II. SCE'S APPLICATION

A. The Decision Provides An Adequate Opportunity for SCE to Recover Its Costs of the New Programs

SCE joins SDG&E in contending that the Decision "might not" provide an adequate opportunity for it to recover its additional costs of the new interruptible programs directed by it. The company refers to the imposition of a reasonableness review and the continuation of the rate freeze in support of this contention. As a result, SCE, like SDG&E, claims that the Decision violates Section 451 and its constitutionally protected right to recover prudently-incurred costs, citing the Hope case, supra.

We do not agree. This contention is meritless for the same reasons as stated above with regard to SDG&E's arguments.

B. Retroactive Opt-Out

1. The Decision Does Not Violate The Rule Against Retroactive Ratemaking or Section 728.

SCE argues that the Decision, by allowing its interruptible customers to opt-out of the interruptible tariffs as of November 1, 2000, constitutes unlawful retroactive ratemaking; and a violation of Sections 728 and 743(f). It further complains that the Decision is arbitrary and capricious on the ground that it reverses two prior decisions (D.01-03-045 and D.01-03-070) in this ongoing rulemaking proceeding. These arguments are incorrect.

As explained in the Decision shortly after the commencement of this proceeding, the Commission, by D.00-10-066 issued October 19, 2000, suspended the portion of SCE's interruptible tariffs that allowed customers to either opt out of the programs, or change their firm service levels, during the 30 day window of November 2000. On January 26, 2001, we issued an emergency order (D.01-01-056) to address potential jeopardy to the public health, safety and welfare resulting from the electricity market's operating outside any reasonable bounds. We granted a limited waiver of penalties for two public utility fuel pipeline customers on interruptible rate schedules in response to a recommendation from the California Energy Commission (CEC). The decision suspended further assessment of penalties that customers on interruptible schedules would otherwise incur for failing to curtail upon request, along with the tolling of hours and number of curtailments. Finally, it directed respondent utilities, including SCE, not to bill customers for already incurred penalties, and to track all penalties in a memorandum account for the period from October 1, 2000 through January 25, 2001. It stated that the Commission would later address whether or not past penalties would be waived.

According to SCE, the Decision violates Section 728 and the rule against retroactive ratemaking by allowing retroactive changes to "all charges" after November 1, 2000 for those interruptible customers who elect under the Decision to opt-out effective as of this date. SCE states that there is no evidence that the interruptible rates and penalties are unreasonable or were improperly set. By allowing such customers to return to firm service rates in effect on November 1, 2000, and thereafter is unlawful because it permits adjustments in rates and penalty charges before the date the memorandum account was established in D.01-01-056.

However, this argument fails for the same reasons stated in D.01-06-042: that the rule prohibiting retroactive ratemaking applies to the promulgation of general rates and not to a rulemaking proceeding limited to reviewing and revising a particular program tariff. (See D.01-06-042, p. 6 and cases cited therein.) The order instituting this rulemaking proceeding and the first decision issued in it (D.00-10-066, dated October 19,

2000) clearly provide notice to all parties that the suspension of the opt-out provision was temporary and that existing interruptible contracts were subject to modification and restoration of their terms to those existing when the contracts were signed. (D.00-10-066, pp. 2-3.) SCE's argument fails to recognize that the prior decisions in this proceeding are all interim decisions, and accordingly subject to adjustment by subsequent decisions as the proceeding develops. The Decision merely revises provisions of an earlier interim decision that suspended the opt-out provision. With regard to the memorandum accounts created in D.01-01-056, that decision stated that all penalties, including those already outstanding and not yet billed from October 1, 2000 to January 26, 2001, were to be included in the account for possible future adjustment. (D.01-01-056, p. 8.) Therefore, SCE's retroactive ratemaking argument is misplaced.

2. Violation of Section 743(f).

SCE further contends that the Decision violates Section 743(f) because this Section does not allow the Commission to amend the terms of SCE's interruptible contracts and tariffs. This contention is not correct. There is no prohibition in Section 743(f) that prevents the Commission from amending or altering interruptible contract provisions retroactively during a rulemaking proceeding expressly stated to involve possible modification of these contractual terms. Indeed, Section 743(f) expressly provides that "Throughout its term of these contracts, the Commission shall have the right to amend the contracts." Moreover, Section 8.1 of SCE's interruptible contract provides that it "shall at all times be subject to changes or modifications" by the Commission as it "may, from time to time, direct in the exercise of its jurisdiction." Neither the statutory or contractual provision limits modifications to be only prospective in effect. Therefore, no statutory violation is involved.

C. Violation of the Rate Freeze (Section 368(a))

Next, SCE maintains that the Decision violates the rate freeze established in Section 368(a) because it allows interruptible customers who opt-out to supposedly alter the excess energy charges and discounted demand and energy charges that were in effect as of June 10, 1996. Consequently, by allowing an interruptible customer to opt-out retroactive to November 1, 2000, SCE claims the Decision unlawfully alters these rates and charges.

This claim is also incorrect. Section 368(a) simply commands that rate levels shall remain in effect until either March 31, 2002, or the date the Commission determines the rate freeze is over. The interruptible rates and penalty charges in effect June 10, 1996 are not changed by the Decision. The temporary suspension of the opt-out provision in accordance with the Commission's express statutory authority to modify interruptible contracts and the subsequent termination of this suspension did not directly change the interruptible rates or penalty charges. No new rate or penalty charge was established. What changed was only the classification of those customers during the suspension period as a result of interim decisions in a rulemaking proceeding promulgated to review and possibly modify the operation of the interruptible program. Instead, those customers who elect to opt-out simply revert from interruptible customer status to firm customer status.

D. Violation of Section 743.1(b)

SCE also argues that the Decision alters the level of interruptible rates and charges in effect on June 10, 1996, in violation of Section 743.1(b)'s directive that "in no event" shall the level of such pricing incentives be altered. Again, the level of rates and charges are not changed by the Decision - only the classification is adjusted for a customer who now elects to opt-out effective as of November 1, 2000. SCE's position overlooks the fact that the order commencing this rulemaking proceeding and D.00-10-066 provided notice that the customers' obligations and rights might be reinstated by termination of the temporary suspension. (See D.00-10-066, p. 1 which states: "We emphasize that this is only a temporary suspension to have sufficient time to evaluate this program and to retain maximum flexibility in crafting programs to address reliability concerns for the Summer of 2001.")

E. Violation of Section 453(a) and (c)

Next SCE asserts that the opt-out provision in the Decision violates Section 453(a) and (c) which require that no public utility shall grant or make any preferential rate for any customer or establish any "unreasonable difference" in rates or services between localities or classes of service.

This assertion is based on the fact that some interruptible customers complied with calls to curtail and thereby sustained economic losses from reduced operations, while other such customers failed to comply and sustained application of the penalty provisions as provided for in the tariff. Because the Decision allows waiver of these penalties for the non-complying interruptible customers, SCE believes the Decision creates an unlawful preference in violation of the section; and an unreasonable difference as to charges for interruptible customers compared to other customer classes who cannot switch service to more favorable rate schedules.

Absent the current electricity crisis, SCE's contention would appear to have some merit, since on first impression it seems unfair to allow non-complying interruptible customers to have their penalties forgiven. However, if they choose to opt-out retroactively to November 1, 2000 they revert to firm service customer status and must repay the rate discounts they received from that date. Having to repay the discounts received should significantly offset the forgiveness of penalties. In this regard, we note the absence of any application for rehearing by a non-complying interruptible customer. In addition, we are convinced that for the reasons stated in both the Decision, as well as in the second interim decision (D.01-01-056), allowing retroactive opt-out with forgiveness of penalties and repayment of discounts is reasonable.

Both D.01-01-056 and the Decision make abundantly clear that this relief is based on the state electricity emergency declared by the Governor's State of Emergency proclamation of January 17, 2001. D.01-01-056 explains the extreme peril to the State economy and the safety of persons and property caused by the shortages, blackouts and domestic price increases existing in the electricity market during the winter (off peak) season of 2000-2001. That decision found that the electricity crisis required a complete reassessment of the operation of the interruptible program. (D.01-01-056, p. 5.) It waived penalties applicable to two public utility pipeline companies; and it suspended penalties for SCE's other interruptible customers. It found that these customers faced an unreasonable dilemma of choosing between compliance, and sustaining the adverse impacts, or non-compliance, and incurring large penalties. The decision found neither choice acceptable, and it suspended the penalties and required the utilities to track "all penalties in a memorandum account (including those already paid, outstanding, and yet to be billed from October 1, 2000 to the present.)" (D.01-01-056, p. 8.)

Likewise, when we issued the Decision less than two months later, we found that the electricity market was continuing to operate outside reasonable bounds; that there was almost a continuous use of interruptible programs rather than the heretofore expected occasional use of these programs; that market conditions have dramatically changed from those that existed in prior years; that interruptible customers should not have to constantly monitor the electricity market to make decisions about buying electricity or curtailing their operations; and that lifting the suspension of the opt-out provision would permit the achievement of a more reliable base of interruptible load for Summer 2001, and more knowledge of the truly available interruptible resources. (D.01-04-006, pp. 82-83, 85, Finding of Fact Nos. 1-12, 28.)

Given these facts and reasons, combined with the notice provided for all parties by the order instituting this proceeding, and the presence of the statutory and contractual authority allowing modification and amendment of interruptible service contracts, the Decision's retroactive opt-out and waiver of penalties provisions are reasonable and not undue or unreasonable under the Commission's broad ratemaking authority provided by Sections 453, 701, and 743. This action falls within the Commission's equitable powers, including the power to reform contracts of public utilities in the public interest. (See Consumers Lobby Against Monopolies v. Pub. Util Comm. (1977) 25 Cal.3d 891, 905-07.) And it does not violate constitutional equal protection requirements since there is a legitimate governmental purpose in the establishment of different rates and conditions of service for interruptible and firm customers, as well as in ameliorating the impact of the adverse consequences on interruptible customers caused by the electricity supply emergency. This complies with rational basis review applicable to utility regulation. (See FCC v. Beach

Communications, Inc. (1993) 508 U.S. 307, 313-14; Ayala v. Superior Court (1983) 146 Cal. App. 3d 938, 943.)

F. Violation of Sections 1708 and 311(g)(1)

SCE claims that the Decision violates Section 1708, which authorizes the Commission to modify a prior decision after providing the opportunity to be heard as provided in complaints. According to SCE, the Decision modifies, without notice or the opportunity to be heard, three earlier decisions in this rulemaking, D.00-10-066, D.01-03-045, and D.01-03-070 because they do not suggest that the right to opt-out would be reinstated retroactive to November 1, 2000. SCE also states that the Assigned Commissioner's draft decision did not propose a retroactive right to opt-out.

This argument also lacks merit. Both D.00-10-066 and D.01-01-056 provide adequate notice that the suspension of the opt-out provision was temporary and could possibly be reinstated by a subsequent interim decision. In addition, the establishment of the memorandum account in D.01-01-056, and the notice that the "waiver of penalties" would be addressed in further "immediate proceedings," provided constructive notice that the opt-out suspension was subject to future revision.[4]

Nor is SCE correct that the Draft Decision of Commissioner Wood failed to contain any notice that the opt-out right might be reinstated. The Draft Decision proposed an opt-out right with conditions retroactive to January 1, 2001. (Draft Decision of Commissioner Wood, mailed March 16, 2001, p. 11-15.) And there was comment on the issue at the March 22, 2001 oral argument. (Vol. 6, Oral Argument Transcript, pp. 279, 297, 304-08, 311, 313, 335-36.) Therefore, there has not been any violation of Sections 1708 or 311(g)(1).

Finally, Section 1708.5(f) provides express authority for the Commission to amend a regulation using comment rulemaking procedures without an evidentiary hearing. As we stated in D.01-03-045, which denied rehearing of the first interim

[4] With regard to the waiver of past penalties, SCE is correct that "immediate proceedings" were not commenced to address this subject, and a survey of interruptible program options was not undertaken. They were postponed and included for disposition in Phase 2 of this proceeding. (See Phase 2 Scoping Memo and Ruling of Presiding Officer and Assigned Commissioner, dated September 21, 2001.)

decision in this proceeding, evidentiary hearings are not required prior to the adoption of an emergency interim decision when the opportunity to be heard later in the proceeding is available. (Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation (1996) 69 CPUC2d 263 at 270, and Sale v. Railroad Comm. (1940) 15 Cal.2d 612, 618.)

G. Violation of Section 1705

SCE insists that factual and legal issues material to the Decision were not considered; and that, therefore, this is a violation of Section 1705, which requires findings of fact and conclusions of law on all issues material to the decision. SCE's contention is primarily related to the retroactive opt-out provision in the Decision. It maintains that evidence must be heard regarding whether the retroactive opt-out unduly discriminates against other interruptible customers who complied with curtailment directives; and that a finding is required that the excess energy charge (i.e., the penalty amount for noncompliance) was unreasonable.

Public Utilities Code Section 1705 provides that Commission decisions shall contain findings of fact and conclusions of law on all issues material to the order or decision. (Pub. Util. Code, §1705, see also Pub. Util. Code §1757, subd. (a)(3).) The California Supreme Court has observed that findings of fact and conclusions of law by the Commission are intended to assist the court in ascertaining the principles relied on by the Commission so that a court may determine whether the Commission acted arbitrarily. (California Manufacturers Ass'n v. Public Utilities Com. (1979) 24 Cal.3d 251, 258-59.) For example, the California Supreme Court has held that the findings of fact and conclusions of law by the Commission were adequate if they disposed of all issues necessary and relevant to the Commission's decision to sanction a company on the grounds that service was used for illegal purposes. (Goldin v. Public Utilities Commission (1979) 23 Cal.3d 638, 670.) Additionally, findings and conclusions are meant to assist the parties in preparing for rehearing or court review. (California Manufacturers Ass'n. v. Public Utilities Com., supra, 24 Cal.3d at 258-59.)

After review of these principles, we conclude that SCE's position lacks merit. The reasonableness or lawfulness of the specific excess energy charge was not an issue in this proceeding. The issue under consideration in this rulemaking proceeding was the function and operation of the interruptible program, given the failure of electricity market to perform within any reasonable bounds. (D.01-04-006, pp. 13-19.) There is no doubt from the evidence in the record based on Commission staff proposals, workshops, comments and oral argument that interruptible customers were being placed in an untenable position as a result of the electricity crisis. The assumptions, analyses, and judgments used by interruptible customers in making decisions to participate in the program were rendered useless with the result that reinstatement of the option to readjust by opting out was reasonable and in the public interest. We concluded that although questions were raised about SCE's marketing practices for its interruptible program compared to PG&E's and SDG&E's, it was not the time to address this issue. Rather, we chose to "focus on new programs and solutions for Summer 2001 rather than restructuring prior obligations to meet current market realities." (D.01-04-006, p. 16.) Under our broad discretionary ratemaking authority, this was reasonable.

Accordingly, the Decision declined to adopt the limited opt-out proposals set out in the Assigned Commissioner's Draft Decision because they contained complications. In the interest of conserving time and the limited resources of the Commission, our staff, and the parties, we concluded that the customer should be allowed to choose the effective date of the opt-out, either November 1, 2000, or a date consistent with the beginning of the next billing cycle. And the reasons for designating November 1, 2000, were expressly set out. (D.01-04-006, pp. 17-18.) This discussion in the Decision forms a rational basis for allowing the retroactive opt-out. However, we will add an additional finding of fact to clarify this point.

H. Adoption of the Expedited Complaint Procedure for Resolution of Essential Use Customer Classification Disputes

The final assertion of legal error advanced by SCE relates to the Decision's adoption of the expedited complaint procedure established by Section 1702.1, and codified in Rule 13.2of the Rules of Practice and Procedure (Rule 13.2 Procedures). The utility maintains that such adoption denies it due process and is arbitrary and capricious.

The basis for this claim is that there is no evidentiary support or any finding of fact dealing with this subject; and that this procedural determination was not included in the Draft Decision or the alternate decision. Rather, it was first raised in the Assigned Commissioner's Ruling issued after both of the above proposed decisions were issued for review; and therefore SCE was denied an opportunity to comment. Further, the company contends that the Rule 13.2 Procedures are limited by statute to small money disputes similar to small claims court proceedings; and that essential user classification cases will involve legal issues justifying the need for representation by counsel and the maintenance of a formal record, transcript, etc.

On initial review, there is an appearance of some merit to SCE's position. There is no finding of fact in the Decision, although two conclusions of law relate to it. (Conclusions of Law Nos. 37 and 38.) Ordering Paragraph No. 6 orders the respondent utilities to implement the notification procedures established by the March 27, 2001 Assigned Commissioner Ruling for customers reclassified between essential and non-essential categories. It also directs that customer reclassification complaints shall be processed under the Rule 13.2 procedures, and that the burden of proof is on the serving utility as to the correctness of its classification of the complaining customer. However, we believe that this action establishing a procedural option for future complaint filings does not constitute legal error, given the emergency conditions involved in this proceeding.

Although SCE is legally correct that the Rule 13.2 procedures are designed for money based complaints in parallel with civil court small claims court actions, and that it will not have the benefit of representation by counsel or the maintenance of a formal record, there are ameliorating circumstances which should serve to protect SCE's legal rights. First, if it concludes that a particular complaint raises such grave issues that it should have litigation rights equal to those present in a regular complaint case, it may request recalendaring under Rule 13.2(g). And after a decision is issued, it may file for rehearing to secure a new hearing under regular hearing procedures. These two procedural remedies should provide ample due process protection. We note that neither PG&E or SDG&E have filed for rehearing on this issue, which indicates that they do not share SCE's fears about operating under this procedure.

Adoption of Rule 13.2 Procedures is justified on the ground that given the electricity supply crisis, prompt resolution of essential user complaints is needed to implement curtailment plans. The Decision explained the importance of narrowing the exempted load. It determined several categories of essential use and required notification by the utilities of reclassifications between essential and non-essential status. It also stated that the situation required implementation "without delay" to allow "reasonable opportunity for programs to be finalized and marketed …" (D.01-04-006, pp. 43-44, 54, 82.) One logical consequence would be that a prompt, effective procedural remedy be available for those customers who disagreed with a reclassification notice and wanted it reviewed by the Commission. Until some experience is gained with this procedural aspect of the Decision which demonstrates that utilization of these procedures results in due process problems, SCE's argument is speculative. However, we serve notice in this rehearing decision that we stand ready to revise this procedure upon a showing by SCE, or any other party, that it results in a denial of due process rights.

SCE cites <u>California Hotel & Motel Assn. v. Industrial Welfare Comm.</u> (1979), 25 Cal.3d 200, in support of its contention that adoption of Rule 13.2 procedures is arbitrary and capricious. The California Hotel decision is distinguishable from the Commission's adoption of a procedure to be available and used for possible future complaint filings. There has not yet been any harm suffered by SCE, whereas the hotel and motel association was adversely impacted by the imposition of a decision that found its members' wages and work conditions to be inadequate.

THEREFORE, IT IS ORDERED that:

1. Decision 01-04-006 is modified by adding Finding of Fact Nos. 12a and b as follows:

> "12a. Decision No. 01-01-056 stated that waiver of penalties would be addressed in further proceedings in this rulemaking. One method of allowing waiver of penalties is to reinstate the suspended opt-out option.
>
> b. The Assigned Commissioner's Draft Decision proposed limited opt-out rights retroactive to January 1, 2001. Some of these proposals involve potentially complex and controversial calculations, or will require considerable time to implement (See D.01-04-006, pp. 16-18). As a result, it is reasonable to permit interruptible customers to opt-out by terminating the suspension of the opt-out or change in firm service options; and that such customers choose the effective date of the opt-out or firm service adjustment back to November 1, 2000, since many customers would have selected this time period if the opt-out option had not been temporarily suspended."

2. Decision 01-04-006 is modified by adding Finding of Fact No. 76 as follows:

> "76. This decision determines several categories of essential use for curtailment purposes. It is possible that some customers will want to file complaints to seek review of their classification if they have been denied essential user status. A prompt and effective procedural vehicle to resolve any such complaint is in the public interest. It is reasonable to initially use the Expedited Complaint Procedure established in Rule of Procedure 13.2 for this purpose."

3. San Diego Gas & Electric's application for rehearing of Decision No. 01-04-006 is denied.

4. Southern California Edison Company's application for rehearing of Decision No. 01-04-006 is denied.

5. This rulemaking proceeding shall remain open.

This order is effective today.

Dated November 8, 2001, at San Francisco, California.

LORETTA M. LYNCH
President
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners

Commissioner Henry M. Duque, being necessarily absent did not participate.